

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TOBY J. MASSE,

Plaintiff,

vs.

MAGGIE MILLER-STOUT, UNIT  
SUPERVISOR BECERRA,  
COUNSELOR WATKINS, and  
SECRETARY JOHN DOE #1,

Defendants.

NO. CV-08-023-CI

ORDER ADOPTING REPORT AND  
RECOMMENDATION AND DISMISSING  
ACTION FOR FAILURE TO EXHAUST

BEFORE THE COURT is Plaintiff's timely Objection to the Report and Recommendation to dismiss this action for failure to exhaust administrative remedies (Ct. Rec. 24). Plaintiff, a prisoner at the Stafford Creek Corrections Center, is proceeding *pro se*; Defendants have not been served.

In response to the Report and Recommendation, Plaintiff asserts he has exhausted all available administrative remedies; *sua sponte* dismissal is improper; and dismissal will not further the goals of the Prisoner Litigation Reform Act.

Even if Plaintiff has now exhausted his administrative remedies, he did not do so prior to filing this action. As previously advised, exhaustion must precede the filing of the complaint and compliance with the statute is not achieved by satisfying the exhaustion requirement during the course of an action. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). Plaintiff did not comply with 42

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1 U.S.C. § 1997e(a).

2 Next, Plaintiff contends he was not properly notified of the  
3 procedure by which the court has decided to dismiss his case. To the  
4 contrary, Plaintiff was granted an opportunity, first to show cause  
5 why this action should not be dismissed for failure to exhaust  
6 administrative remedies, and then to file objections to the Report and  
7 Recommendation. Plaintiff's assertion is not well taken.

8 Finally, Plaintiff asserts the goals of the Prison Litigation  
9 Reform Act are to "provide prisoners with a fair opportunity to  
10 correct their own errors, reduce the quantity of prisoner suits, and  
11 improve the quality of prisoner suits by creating an administrative  
12 record." He states he will re-file if his case is dismissed, which he  
13 claims does not achieve these goals. The court finds the  
14 aforementioned goals are not diminished by enforcing compliance with  
15 the requirements of 42 U.S.C. § 1997e(a).

16 For the reasons set forth above and in the Report and  
17 Recommendation, **IT IS ORDERED** the Report and Recommendation (Ct. Rec.  
18 23) is **ADOPTED in its entirety**, and the action is **DISMISSED without**  
19 **prejudice**. While dismissal for exhaustion is ostensibly for failure  
20 to state a claim upon which relief may be granted<sup>1</sup>, the court will not  
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23 <sup>1</sup>See *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 921 (2007),  
24 citing with approval, *Leveto v. Lapina*, 258 F.3d 156, 161 (3rd Cir.  
25 2001) ("[A] complaint may be subject to dismissal under Rule 12(b)(6)  
26 when an affirmative defense ... appears on its face" (internal  
27 quotation marks omitted)).

1 count this dismissal as one under 28 U.S.C. § 1915(g), which might  
2 limit Plaintiff's ability to file actions *in forma pauperis* in the  
3 future. Plaintiff is free to file a new action if he has, indeed,  
4 fully exhausted his administrative remedies. He is responsible to pay  
5 the full filing fee in this action, and in any future action he  
6 chooses to file.

7 **IT IS SO ORDERED.** The District Court Executive is directed to  
8 enter this Order, enter judgment, forward a copy to Plaintiff and  
9 close the file.

10 **DATED** this 27th day of August, 2008.

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12 ***s/Lonny R. Suko***

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14 LONNY R. SUKO  
15 UNITED STATES DISTRICT JUDGE  
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